

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

- against - :

KENNETH THOMAS, :

Defendant. :

- - - - -x

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OPINION

06 Cr. 835 (DC)

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**CHIN, D.J.**

On December 23, 2006, defendant Kenneth Thomas, a citizen of the United Kingdom, was flying from London to New Zealand to meet his common law wife for the holidays. His plane landed at Los Angeles International Airport ("LAX") for what was scheduled to be a three-hour layover. Instead, United States authorities arrested him on an indictment that had been filed in this District three months earlier, charging him with illegally entering, attempting to enter, or being found in the United States, after having previously been deported from the country, in violation of 8 U.S.C. § 1326. He has been held in custody since his arrest.

Thomas moves to dismiss the indictment, arguing that the charges are barred by the applicable statute of limitations because he re-entered the United States more than five years before the indictment was filed and because he has not been present in the United States since 1999. The Government acknowledges that the statute of limitations has expired on the charge of illegal reentry, but argues that the statute of limitations has not run on the charge that Thomas was "found in" the United States because federal authorities did not learn until May 2006 that Thomas had been arrested in New York state court in October 1999 for criminal trespass. The Government acknowledges, however, that it is not aware of any evidence of Thomas's presence in the country from 1999 until he was arrested at LAX in December 2006. Indeed, it appears that Thomas was not in the country when he was indicted in September 2006 for, inter alia, being "found in" the United States.

The issue presented is whether a defendant can be "found in" the United States for purposes of 8 U.S.C. § 1326 when he is no longer in the country and the Government is unaware of his whereabouts. I conclude that he cannot, and that Thomas could not have been "found in" the United States when he was indicted because he was not physically present in the country at that time and the Government was unaware of his whereabouts. Accordingly, it would appear that the indictment is legally insufficient.

**BACKGROUND**

**A. The Facts**

Thomas, a citizen of the United Kingdom, first entered the United States on September 11, 1990, without a visa, pursuant to the Visa Waiver Pilot Program (the "VWPP"). (Def. Mem. of Law 2). Under this program, entrants to the United States were authorized to remain in the United States for a period not to exceed ninety days. (Def. Notice of Mot. Ex. C). Under the VWPP, an entrant waived his right to review of a deportability finding made by the Immigration and Naturalization Service ("INS"), although any application for asylum filed with INS would be decided by an immigration judge. (Def. Not. of Mot. Ex. B).

Thomas overstayed his 1990 entrance under the VWPP. (Def. Not. of Mot. Ex. C). He was arrested by the New York Police Department (the "NYPD") on January 6, 1992, and charged with third degree criminal possession and sale of a controlled substance. (Hickey Aff. Ex. A). Thomas pled guilty, and was sentenced to a term of one to three years' imprisonment. (Harrison Aff. Ex. A).

On April 26, 1993, while Thomas was incarcerated for the offenses in New York, INS issued Thomas an order to show cause and notice of hearing regarding deportation. (Def. Notice of Mot. Ex. C). A hearing was held on December 13, 1993, but subsequently INS determined that because Thomas had entered pursuant to the VWPP, he had waived any right to contest deportability (other than by applying for asylum), and

consequently he was not entitled to a hearing. (Def. Notice of Mot. Exs. G, H). A warrant for deportation was issued by INS on February 16, 1994 (Hickey Aff. Ex. B), and thereafter Thomas was deported from the United States. (Def. Mem. of Law 2).

Sometime prior to October 17, 1999, Thomas reentered the United States. On that date, he was arrested by the NYPD for criminal trespass in the third degree. (Hickey Aff. Ex. C). He was arraigned, and pled guilty the following day. (Harrison Aff. Ex. C). He subsequently failed to appear or pay the required surcharge fee, and a bench warrant was issued for his arrest on December 20, 1999. (Harrison Aff. ¶ 6 & Ex. A). At some point after October 17, 1999, Thomas voluntarily departed the United States.

The record contains no evidence to suggest that Thomas was present in the United States from December 1999 until his arrest at LAX in December 2006. (See 6/15/07 Tr. 8 (Government acknowledging it had no evidence that Thomas was in the United States between December 1999 and December 2006)). Thomas contends that he was not present in this country during that time period. (Def. Mem. of Law 2).<sup>1</sup>

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<sup>1</sup> On the other hand, Thomas also initially asserted that he was not present in the United States in 1999, contending that he was never arrested by New York authorities in 1999. The Government presented documentary evidence to show that the assertion was false, as fingerprints and an arrest photo establish conclusively that Thomas was arrested by the NYPD in October 1999. (Harrison Aff. ¶¶ 5, 6, 7 & Exs. B, C, D; Hickey Aff. Exs. A, C, D, E).

On May 25, 2006, Immigration and Customs Enforcement ("ICE"), the successor agency to INS, first became aware of Thomas's 1999 arrest following his 1994 deportation. (Harrison Aff. ¶ 12; 6/15/07 Tr. 9-10). On September 19, 2006, the Government filed an indictment in this Court, charging Thomas with violating 8 U.S.C. §§ 1326(a) and (b)(2), in that "[f]rom at least October 1999, up to and including the date of" the indictment, Thomas "did enter, and was found in the United States, after having been deported" therefrom. (Indict.). An arrest warrant was issued the same day.

On December 23, 2006, Thomas arrived at LAX in transit between London and New Zealand. (5/17/07 Yarella Ltr. Ex. B). His travel documents show that he was scheduled for a three-hour layover before departing from LAX to New Zealand. (Id.). International travelers who are present in a United States airport for such a layover still must present paperwork to a Customs inspector. (6/15/07 Tr. 12). When Thomas did so at LAX on December 23rd, he was arrested. (Hickey Aff. ¶ 5 & Ex. D).<sup>2</sup>

#### **B. Prior Proceedings**

Thomas first appeared in this Court on January 11, 2007, and was assigned counsel. He requested and was granted new

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<sup>2</sup> The Government does not contend that Thomas's layover at LAX on December 23, 2006 and his subsequent arrest constitute a violation of any prong of § 1326; in other words, the Government does not contend that Thomas entered or attempted to enter or was "found in" the United States by virtue of his presence at LAX for the layover or his subsequent arrest. (See 6/15/07 Tr. 10-11). Indeed, the indictment was filed in September 2006, three months before these events.

counsel on February 28, 2007. The new attorney, however, asked to be relieved. The request was granted and a third attorney -- Thomas's present counsel -- was appointed on March 20, 2007.

On May 11, 2007, Thomas moved to dismiss the indictment, contending: (1) the statute of limitations had run on any violation of § 1326, because he reentered the United States prior to the 1999 arrest, more than five years before he was indicted, and the Government had no proof that Thomas was present in the United States after December 1999, and (2) there were defects in the underlying deportation proceedings.

I heard argument on the motion on June 15, 2007. I denied the second prong of the motion, ruling from the bench that Thomas was not entitled to a deportation hearing because he had waived the right to contest deportation (other than to apply for asylum) when he entered the country pursuant to the VWPP. (6/15/07 Tr. 6). I reserved decision as to the first prong of the motion.

#### **DISCUSSION**

The Government contends that Thomas was "found in" the United States no earlier than May 2006, when federal authorities first learned of his 1999 presence in New York. The issue is whether a defendant can be "found in" the United States when he is no longer in the country. I conclude, based on the plain language of the statute, its purpose, the case law, and common sense that he cannot.

**A. The Language of the Statute**

Section 1326 of Title 8 of the United States Code provides that "any alien who . . . has been . . . deported . . . and thereafter . . . enters, attempts to enter, or is at any time found in, the United States," without consent of the Attorney General, commits a crime. 8 U.S.C. § 1326(a). Violations of § 1326 are governed by the five-year statute of limitations generally applicable to non-capital offenses found in 18 U.S.C. § 3282.

Section 1326 was originally passed as part of the 1952 Immigration and Nationality Act (the "INA"). See Immigration and Nationality Act, ch. 8, § 276, 66 Stat. 226, 229 (1952) (codified at 8 U.S.C. § 1326). While portions of the INA have subsequently been amended, the language of this provision has not changed since its original passage. The term "found in" is not defined in 8 U.S.C. § 1101, the section setting out definitions for the chapter, and the legislative history is likewise silent as to its meaning. See 8 U.S.C. § 1101; H.R. Rep. No. 82-1365 (1952), as reprinted in 1952 U.S.C.C.A.N. 1653, 1683, 1723-24.

The Government urges this Court to read the "found in" provision of § 1326 as being available in the past tense -- to mean that the crime of being "found in" may be completed when "the [G]overnment is both aware that [a defendant] was present in the country, and that his presence was in violation of the statute." (6/15/07 Tr. 9) (emphasis added). In essence, the Government is arguing that the "is at any time found in" language

of the statute is synonymous with "finding out about" an alien's illegal presence, past or present.

This reading contravenes the plain language of the statute. An alien is "found in" the United States only if he is actually present; he also must be "found." If the Government learns that an alien had previously been in the country but his whereabouts are presently unknown, that person is not "found." While the Government learned in May 2006 that Thomas had been present in the United States in 1999, it did not "find" Thomas at that point because Thomas's whereabouts were unknown -- the Government did not know whether he was in the United States. In addition, the statute's use of the present tense "is" implies that the alien "is" -- not "was" -- physically located in the United States when the federal authorities learn of his presence.

Hence, the plain wording of the statute supports the conclusion that an alien must be present in the country to be "found in" the United States.

**B. The Purpose of the Statute**

As the Second Circuit has observed, § 1326 "is designed to punish an alien who, following his deportation . . . attempts to reenter or enter or, having reentered remains illegally in the country until he is found here." United States v. Whittaker, 999 F.2d 38, 41-42 (2d Cir. 1993). In exploring the three provisions of § 1326, the Second Circuit also quoted a Fifth Circuit decision as follows:



The clear language in 8 U.S.C. Section 1326(a)(2) provides three separate occasions upon which a deported alien may commit the offense: 1) when one illegally enters the United States; 2) attempts to illegally enter the United States; or 3) when a deported alien is found at any time in the United States. The plain words of the statute set out discrete points in time when the crime may be committed.

Id. at 42 (quoting United States v. Gonzales, 988 F.2d 16, 18 (5th Cir. 1993)); accord United States v. DiSantillo, 615 F.2d 128, 135 (3d Cir. 1980) ("Congress intended a distinction between surreptitious crossing of the United States border and entry at a recognized INS port of entry.").

In United States v. Rivera-Ventura, the Second Circuit again read § 1326 as criminalizing "three discrete points in time." There, the Court observed that "[s]ection 1326(a), by its terms, describes an offense that is complete when any of three events occurs: when a previously deported alien (1) 'enters,' or (2) 'attempts to enter,' or (3) 'is at any time found in' the United States." United States v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995). The Court went on to state that

the 'found in' clause was included [by Congress] to make it clear that if an alien illegally reenters the United States after deportation, he is subject to prosecution even if the government does not discover him or the illegality of his entry until after the time to prosecute him for illegal entry has expired.

Id. at 282. Although the Government suggested at oral argument that "the crime of entering may continue," relying on United States v. Morgan, 380 F.3d 698, 702 n.3 (2d Cir. 2004), I follow

the Second Circuit's holding in Whittaker that Congress purposefully included the "found in" provision to "cover aliens who were found in the United States following their illegal reentry" after the statute of limitations on the entry had expired. Whittaker, 999 F.2d at 42.

In arguing that the "found in" language covers a situation where an alien had previously been present in the United States but no longer is, the Government is conflating two of the three scenarios. An alien who is "found in" the United States after having been deported obviously reentered the United States. He can be prosecuted for the entry, as long as he is indicted within five years. He can be prosecuted for being "found in" the United States "at any time" -- even more than five years after he reentered -- as long as he "is . . . found" here, that is, as long as he is present, for it is his continued presence that is illegal. The "found in" scenario clearly was not intended to cover the situation where an alien enters the United States but then leaves before the Government discovers his presence.

**C. The Case Law**

The Court is not aware of any cases discussing the "found in" provision § 1326 in a situation where the defendant left the country before his presence was discovered, but several cases decided by the Second Circuit are instructive.

In Whittaker, the Second Circuit concluded that § 1326 is "designed to punish an alien who, following his deportation

after commission of a felony and without the permission of the Attorney General attempts to reenter or enters or, having reentered, remains illegally in the country until he is found here, i.e., his presence is discovered." 999 F.2d at 41 (emphasis added); see United States v. Mancebo-Santiago, 886 F. Supp. 372, 374 (S.D.N.Y. 1995) (finding that the language of § 1326 "explicitly makes it a crime for an alien to remain in this country after an illegal reentry"), aff'd, 112 F.3d 506 (2d Cir. 1996). In finding that § 1326 is not unconstitutionally vague, the Court observed that "the 'found in' provision informs an alien" who illegally reenters "that he will be deemed guilty of an offense when he is discovered." Whittaker, 999 F.3d at 42. The Court held that § 1326 alerted the defendant that "if he remained in this country following his illegal reentry, he would be subject to criminal prosecution when he was 'found' here." Id. at 42-43.

In Rivera-Ventura, before holding that an alien's flight from the authorities tolled the statute of limitations for illegal reentry under § 1326, the Second Circuit explored the meaning of the "found in" provision of § 1326(a). 72 F.3d 277, 282 (2d Cir. 1995) (concluding in dicta that there is no indication that Congress intended the "found in" prong of § 1326 to constitute a continuing offense). But see United States v. Morgan, 380 F.3d 698, 703-04 (2d Cir. 2004) (finding it unnecessary to reach the Government's tolling argument because the alien's second illegal reentry supported a new five-year

statute of limitations). The Court observed that "[t]he offense[s] of illegal entry or illegal attempt" -- the first two events in § 1326 -- are "complete as soon as the entry or attempt is made." Id.; see United States v. Acevedo, 229 F.3d 350, 355 (2d Cir. 2000) (same); United States v. Gitten, No. 00 Civ. 9100 (DLC), 2001 WL 363052, at \*3 (S.D.N.Y. Apr. 10, 2001) (same).

The completeness of the offense of being "found in" the United States, however, "depends not only on the conduct of the alien but also on acts and knowledge of the federal authorities." Rivera Ventura, 72 F.3d at 281. The Court explained that "the offense of being 'found in' the United States . . . is not complete until the authorities both discover the illegal in the United States, and know . . . the illegality of his presence." Id. (citations omitted). The Rivera-Ventura Court also observed that "Congress's use of the word 'found' suggests a focus on the time at which the authorities' location of the alien and their knowledge of his presence converge, and that focus indicates that the offense is complete at the time of that convergence," and also that the "found in" offense is only completed when "the alien is located." Id. at 282 (emphasis added); see United States v. Forrester, No. 02 Cr. 302 (WHP), 2002 WL 1610940, at \*3 (S.D.N.Y. July 22, 2002); accord United States v. Lennon, 372 F.3d 535, 541 (3d Cir. 2004) (alien "found in" the United States when he is apprehended by the INS); United States v. Parga-Rosas, 238 F.3d 1209, 1213 (9th Cir. 2001) (alien found if free from official restraint at the time officials discover or apprehend

him); United States v. Ruiz-Lopez, 234 F.3d 445, 448 (9th Cir. 2000) (mere presence on U.S. soil not enough to be "found in"; alien must also be free from official restraint at that time); United States v. Hernandez, 189 F.3d 785, 791 (9th Cir. 1999) (offense of "found in" complete when alien is "discovered and identified"); United States v. Santana-Castellano, 74 F.3d 593, 597 (5th Cir. 1996) (the "found in" prong of § 1326 "prohibits deported aliens, who have illegally reentered the United States, from remaining in the country") (emphasis added); United States v. Ortiz-Villegas, 49 F.3d 1435, 1436 (9th Cir. 1995) (same); United States v. Alaya, 35 F.3d 423, 425 (9th Cir. 1994) ("To avoid being "found in" the United States, a deported alien can either not re-enter the United States or, if he has already re-entered the United States, he can leave.").

Although no court has explicitly held that an alien must be present in the United States to be "found" here, these holdings clearly suggest that the alien's physical presence in the United States at the time the authorities discover his illegal status is a required element of the "found in" violation of § 1326. As the Court in Whitaker stated, an alien is "found in" the United States when he reenters and "remains illegally in the country until he is found here." 999 F.2d at 41 (emphasis added).

#### **D. Common Sense**

Finally, the Government's position simply is not logical. It does not make sense that a person can be "found" by

the authorities when his presence is not known. Indeed, the Government's own arguments at the June 15th hearing betray the illogic of its position.

During the Court's colloquy with the Government about its assertion that the statute of limitations did not start to run until May 25, 2006, the date the authorities learned of Thomas's 1999 presence, the Government stated that it is "not even sure [the statute of limitations] began to run [that day] because the cases suggest the [G]overnment has to have some idea of where the alien is at the moment, and so it may have begun to run after that." (6/15/07 Tr. 10). Later, the Court asked the following: "[W]hen is it that the [G]overnment alleges Mr. Thomas was 'found in' the United States?" (Id. at 17). The Government replied: "It could not have been earlier than May 25, 2006. It may have been later than that." (Id.).

This argument makes the point. If the statute of limitations had not begun to run because Thomas was not "found" -- the Government did not know his whereabouts -- then the crime could not have been complete and Thomas could not have been indicted in September 2006 for being "found in" the United States.

The Government also suggested that if an alien had been illegally present in the United States forty years ago, never having returned to this country, the Government could prosecute him now for being "found in" this country if the Government (acting with due diligence) did not learn until now of that

person's presence in the country forty years ago. (6/15/07 Tr. 20-21). The law cannot countenance such a result.

For the above reasons, I conclude that the "found in" provision of § 1326 requires both that the authorities know that an alien's presence in the United States is illegal, and that the alien is physically present in the United States at that time. The "found in" provision of § 1326 requires that the authorities both physically locate the alien and know that his presence in the United States is illegal, see Rivera-Ventura, 72 F.3d at 282. All that has occurred here is that in May 2006 the Government "found out about" Thomas's 1999 presence, and this is inadequate under the "found in" provision of § 1326. Because the Government does not (and, as it acknowledges, could not) contend that Thomas's December 2006 arrest at LAX constitutes any violation of § 1326, I can only conclude -- on all the known facts -- that Thomas has not been "found in" the United States for purposes of § 1326.

**E. Remedy**

As the statute of limitations has run on any 1999, or prior, illegal reentry, the Government either has indicted Thomas for a crime for which the statute of limitations has run, or it has indicted him for a crime that he has yet to commit.

A court may dismiss an indictment that is legally insufficient. See United States v. Tanu, 589 F.2d 82, 86-87 (2d Cir. 1978). An indictment is sufficient "if it, first, contains the elements of the offense charged and fairly informs a

defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." United States v. Solomonyan, 451 F. Supp. 2d 626, 640 (S.D.N.Y. 2006) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)). As the Second Circuit has explained, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." United States v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992) (citations omitted).

When deciding a motion to dismiss pursuant to Federal Rule of Criminal Procedure 12(b), a court must accept all factual allegations in the indictment as true. United States v. Clarke, No. 05 Cr. 17 (DAB), 2006 WL 3615111, at \*1 (S.D.N.Y. Dec. 7, 2006) (citations omitted). A court should not look beyond the face of the indictment and draw inferences as to proof to be adduced at trial, for "the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment." United States v. Alfonso, 143 F.3d 772, 776-77 (2d Cir. 1998). Where, however, the Government "has made what can fairly be described as a full proffer of the evidence it intends to present at trial," a district court may evaluate "the sufficiency of the evidence . . . on a pretrial motion to dismiss an indictment." Id. at 777 (citing circumstance where court could dismiss for lack of jurisdiction); see United States v. Gotti, 457 F. Supp. 2d 411, 421 (S.D.N.Y. 2006); accord United



States v. Flores, 404 F.3d 320, 325 (5th Cir. 2005) (finding "no error in the district court's procedure of resolving a legal question in a pre-trial motion to dismiss the indictment"); United States v. Risk, 843 F.2d 1059, 1061 (7th Cir. 1988) ("The district court found no violation and correctly dismissed the indictment, not because the government could not prove its case, but because there was no case to prove."). "In reviewing the sufficiency of the evidence, the court must view all of the evidence in the light most favorable to the Government and determine if there is any evidence 'upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.'" Gotti, 457 F. Supp. 2d at 421 (quoting United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984)).

Moreover, "a court . . . does not have the power to dismiss an indictment that is legally sufficient under the test of [Federal Rule of Criminal Procedure] 29, simply because it deems the dismissal to be in the interests of justice." Tanu, 589 F.2d at 86. Indeed, "[u]nder the separation of powers, the executive branch, rather than the judiciary, retains the power to dismiss [a] prosecution on other than strict grounds of insufficiency in law." Id. at 86-97.

Here, the indictment does track the language of the statute and does allege the elements of the crime charged. But the Government concedes that the statute of limitations has expired on the charge that Thomas illegally entered in or before October 1999, and it is unaware of any evidence that Thomas was

physically present in the United States from December 1999 through the date of the indictment. Hence, if the Court's interpretation of § 1326 is correct, then it would appear that there is no basis for the indictment and it is factually and legally insufficient.

At the same time, Thomas was taken into custody on December 23, 2006, two days before Christmas, as he was traveling from London to New Zealand to meet his common-law wife. He has now been detained for more than six months.

Under the circumstances, the indictment should be dismissed, as legally insufficient and in the interests of justice, or, at a minimum, Thomas should receive a speedy trial.

**CONCLUSION**

For the reasons set forth above, I conclude that the Government's interpretation of § 1326 is incorrect as a matter of law. The Court will hold a conference on June 27, 2007, at 3:30 p.m. to discuss (1) whether the Government has any additional evidence to proffer in support of the charges, (2) whether the Court has the authority to dismiss the indictment at this juncture, (3) if so, whether the indictment should be dismissed as legally insufficient, and (4) if not, whether the case should be tried as early as July 10, 2007.

SO ORDERED.

Dated: New York, New York  
June 26, 2007

  
DENNY CHIN  
United States District Judge